

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.329 of 2015**Judgment Reserved on : 15.12.2016Judgment Delivered on : 21.12.2016

Tilsaay Uraon, S/o Late Pokala Ram, Caste Urao, aged about 19 years,
Resident Village Bhitawahi, Sulesha, Chowki Pandrapath, Thana Bagicha,
District Jashpur (Chhattisgarh)

---- Appellant**versus**

State of Chhattisgarh through Station House Officer, Police Station Sanna,
District Jashpur (Chhattisgarh)

--- Respondent

For Appellant : Shri Anurag Verma, Advocate
For State/Respondent : Shri Neeraj Sharma, Deputy Government Advocate

Hon'ble Shri Justice Anil Kumar Shukla**C.A.V. Judgment**

1. This appeal has been preferred under Section 374(2) of the Code of Criminal Procedure (henceforth 'Cr.P.C.') being aggrieved by the judgment dated 30.8.2013 passed in Sessions Trial No.45 of 2013 by the Additional Sessions Judge (F.T.C.), Jashpur, District Jashpur, whereby the Appellant/accused has been convicted under Sections 363, 366 and 376 of the Indian Penal Code (henceforth 'I.P.C.') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (henceforth 'the Act, 2012') and has been sentenced to undergo rigorous imprisonment for 3 years and to pay fine of Rs.500/-, rigorous imprisonment for 5 years and to pay fine of Rs.500/-, rigorous imprisonment for 7 years and to pay fine of Rs.500/- and rigorous imprisonment for 7 years and to pay fine of Rs.500/-, respectively. In default of payment of fine, the Appellant has been sentenced to undergo additional rigorous imprisonment for 1 month each on all the counts. All the sentences are directed to run concurrently.

2. The prosecution case, in brief, is that on the date of incident the prosecutrix was a student of VIIIth Standard. She used to go to school with her friend Hirmuniya, where Appellant/accused Tilsaay became acquainted with the prosecutrix. The Appellant/accused with an offer that he will marry the prosecutrix used to allure her. On 22.3.2013, marriage of the daughter of villager Ramprasad was to take place in the village. The prosecutrix along with her parents had gone to attend the marriage ceremony. The Appellant/accused had also gone to attend the marriage ceremony. On 24.2.2013, after the marriage ceremony, the prosecutrix along with her friend Hirmuniya was sitting near the Pokhara Pond. The Appellant took the prosecutrix from there to his home. Next day, the Appellant took her from there to Ambikapur and from there, he took her to the house of his uncle (*Fufa*) at Village Samarbar and committed forcible sexual intercourse with her. At the time of taking her from the pond, the Appellant had threatened the prosecutrix that if she will not go with him, he will cut her and throw her body. On missing of the prosecutrix, her father Thuparam lodged *Dehati Nalishi* (Ex.P-3) in Police Station Sanna. First Information Report (Ex.P-11) was registered against the Appellant/accused in Police Station Sanna. A copy of the FIR was presented in the Court of Judicial Magistrate First Class, Bagicha. The prosecutrix was recovered from the house of Deonath at Village Samarbar vide Recovery Panchnama (Ex.P-2). After obtaining consent of the prosecutrix and her father vide Ex.P-1, the prosecutrix was sent for medical examination. Her medical examination report is Ex.P-9. Spot-map (Ex.P-4) was prepared. The Appellant was also sent for medical examination and his medical report is Ex.P-10. Underwear of the prosecutrix was seized vide Ex.P-6. Underwear of the Appellant was seized vide Ex.P-7. Vaginal slides of the

prosecutrix were prepared and were seized vide Ex.P-13. For determination of age of the prosecutrix, x-ray of the prosecutrix was taken out and report (Ex.P-17) was obtained from the Radiologist. Mark-sheet of Vth Standard of the prosecutrix was seized vide Ex.P-5. The Appellant/accused was arrested vide Ex.P-12. The seized articles were sent for forensic examination and the FSL report is Ex.P-15. Statements of the witnesses were recorded under Section 161 Cr.P.C. After completion of the investigation, the Appellant/accused was charge-sheeted for the offences punishable under Sections 363, 366 and 376 I.P.C. and Section 4 of the Act, 2012. He denied the guilt. On his denial, trial was conducted. The prosecution examined as many as 14 witnesses. The Appellant/accused, except his examination under Section 313 Cr.P.C., did not examine any witness in his defence. After affording opportunity of hearing and leading evidence to both the parties, the Trial Court has convicted and sentenced the Appellant/accused as mentioned above. Hence this appeal.

3. The main ground raised on behalf of the Appellant/accused in this appeal is that the Trial Court has not properly appreciated the evidence of the prosecution witnesses. It is further submitted by Learned Counsel appearing for the Appellant/accused that the prosecutrix (PW-1) was a consenting party. The contradictions and omissions in the evidence of the prosecution witnesses have not been taken into consideration. The prosecutrix (PW-1) had attained 19 years of age on the date of incident, but the Trial Court did not consider this fact. It is prayed that taking into consideration these facts and grounds, the impugned judgment passed by the Trial Court may be set aside and the Appellant/accused may be acquitted of the charges framed against him.

4. Learned Deputy Government Advocate appearing for the State/Respondent has supported the impugned judgment of the Trial Court. He submits that the Trial Court has rightly arrived at the finding in respect of the age of the prosecutrix. It is evident from the evidence of the prosecutrix (PW-1) that sexual intercourse was committed with her by the Appellant/accused. On the date of incident, the age of the prosecutrix (PW-1) was below 18 years. Therefore, in these circumstances, according to the sixth description of Section 375 I.P.C., which states that committing of sexual intercourse with a woman with or without her consent, when she is under eighteen years of age, is said to have committed rape, the conviction and sentence awarded to the Appellant/accused under Section 376 I.P.C. by the Trial Court is proper. Learned State Counsel further submits that the impugned judgment of conviction and sentence does not warrant any interference and the instant appeal deserves to be dismissed.
5. I have heard Learned Counsel appearing for the parties and perused the evidence available on record with utmost circumspection.
6. The prosecution has examined before the Trial Court the prosecutrix (PW-1), Thuparam (PW-2), father of the prosecutrix, Narharibai (PW-3), mother of the prosecutrix, Bainibai (PW-4), Asanbai (PW-5), Dr. Suchita Minj (PW-6), who medically examined the prosecutrix (PW-1) and gave her report (Ex.P-9), Dr. Sukhram Bhagat (PW-7), who medically examined the Appellant/accused and gave his report (Ex.P-10), Sub-Inspector V.N. Bhardwaj (PW-8), Patwari Oswald Vibhu Khalkho (PW-9), Dr. Sarita Singh (PW-10), who, in respect of determination of age of the prosecutrix (PW-1), has given her report (Ex.P-17), Manjharam (PW-11), Siroj Ram

(PW-12), Videsh Ram (PW-13) and Sukhan alias Sukhnath (PW-14). The Appellant/accused has not examined any witness in his defence.

7. The prosecutrix (PW-1) has deposed that when she along with her friend Hirmuniya was sitting near the Pokhara Pond of the village, the Appellant came there. He was accompanied by Jagdish. The Appellant took her from the pond to his home at Village Bhitwahi and he kept her there for whole night, but he did not do any wrong with her there. Thereafter, at 4:00 a.m., he took her to Ambikapur, where he kept her for one day. Thereafter, he took her to the house of his uncle (*Fufa*) at Village Samarbar, where he kept her for one week and committed illicit sexual intercourse with her. She also deposed that the Appellant had taken her from the pond asking her to accompany him otherwise he would beat her. She further deposed that the Appellant made her sleep with him and committed illicit sexual intercourse with her without her consent. In cross-examination, at para 9, she admitted that the sexual intercourse done with her by the Appellant at Village Samarbar was done with her consent. Thus, from the evidence of the prosecutrix (PW-1) in examination-in-chief and in cross-examination, it is established that sexual intercourse was committed with her by the Appellant/accused.
8. Thuparam (PW-2) and Narharibai (PW-3) are father and mother of the prosecutrix (PW-1). Both these witnesses have stated in their evidence that the Appellant had kidnapped their daughter prosecutrix (PW-1). Thuparam (PW-2) has deposed about lodging of *Dehati Nalishi* (Ex.P-3) in Police Station Sanna. There is no rebuttal in the cross-examination of Thuparam (PW-2) and Narharibai (PW-3) that the Appellant had taken away their daughter

prosecutrix (PW-1) from their lawful guardianship. From the evidence of the prosecutrix (PW-1) it is proved that the Appellant took the prosecutrix (PW-1) with him on the allurements that he will marry her and his purpose was to commit illicit sexual intercourse with her.

9. According to Section 361 IPC, for constitution of offences under Sections 363 and 366 IPC, i.e., kidnapping and after kidnapping committing illicit sexual intercourse, the age of the prosecutrix must be below 18 years. Thus, according to sixth description of Section 375 IPC, even if sexual intercourse is committed with a girl of below 18 years of age with her consent, this constitutes an offence under Section 376 IPC. Therefore, in the instant case, the only question arises for consideration is whether the prosecutrix (PW-1) was below 18 years of age on the date of incident? Learned Counsel for the Appellant has advanced arguments on this count.
10. As far as commission of sexual intercourse with the prosecutrix (PW-1) by the Appellant is concerned, Dr. Suchita Minj (PW-6) examined the prosecutrix (PW-1) on 8.3.2013 at 6:00 p.m. and gave her report (Ex.P-9), which reads as under:

“I/M – Black mole present behind lt. ear.

Examination done in presence of Sr. Puspa & P/c
Aileen Lakra

LMP – 15th Feb 2013, unmarried.

Secondary sexual characters well developed.
Axillary and Pubic hair present. Breast well developed.

Internal examination:-

Hymen torn (old) at 9 and 4 o'clock.

Vagina admits two fingers easily.

White discharge present.

Two vaginal slides prepared, sealed packed &

handed over to the same P/c for FSL.

Opinion – She is habitual. Sexual intercourse has been done.

Adv. X-ray wrist, pelvis & elbow.”

11. Dr. Suchita Minj (PW-6) has opined that the prosecutrix (PW-1) was habitual to sexual intercourse and sexual intercourse was committed with her earlier. Likewise, Dr. Sukhram Bhagat (PW-7), after medically examining the Appellant, has given report (Ex.P-10) in which he has reported that the Appellant is capable of committing sexual intercourse. Therefore, from the evidence of the prosecutrix (PW-1) and the medical evidence, it is proved that the Appellant committed sexual intercourse with the prosecutrix (PW-1).
12. As far as the age of prosecutrix (PW-1) is concerned, she has stated in her deposition at paragraph 4 that the mark-sheet available on record is her own. The defence has not put any question in cross-examination on the deposition of the prosecutrix (PW-1) stating the mark-sheet to be her own. In this circumstance, the evidence of the prosecutrix (PW-1) regarding her mark-sheet remains unrebutted.
13. Thuparam (PW-2), who is father of the prosecutrix (PW-1), has stated at paragraph 3 of his deposition that he had handed over the mark-sheet of Vth Standard of her daughter prosecutrix (PW-1) to the police, which was seized vide Ex.P-5. According to the seizure (Ex.P-5), original mark-sheet of Vth Standard of the prosecutrix (PW-1) was seized in which her date of birth is recorded as 18.9.1996. The original mark-sheet is available on the record. Thuparam (PW-2), in cross-examination at paragraph 6, has deposed the age of the prosecutrix (PW-1) to be 15 years.

Likewise, Narharibai (PW-3), who is mother of the prosecutrix (PW-1), in paragraph 2 of her deposition, has stated the age of her daughter prosecutrix (PW-1) to be 15 years. This evidence of Thuparam (PW-2) and Narharibai (PW-3) regarding the age of their daughter prosecutrix (PW-1) has not been challenged.

- 14.** Dr. Suchita Minj (PW-6) had advised for x-ray of wrist, pelvis and elbow of the prosecutrix (PW-1) for determination of her age. Dr. Sarita Singh (PW-10), Radiologist, District Hospital, Ambikapur took x-ray of the prosecutrix (PW-1) on 11.3.2013. The x-ray plate is numbered as 52, which relates to wrist, pelvis and elbow joint of the prosecutrix (PW-1). It is stated by the Radiologist that the x-ray was taken out for correct determination of age. After examination of the x-ray plate, she has given her report (Ex.P-17) in which she found as under:

- “(a) Upper end of Radius bone was fixed. Age of fixation was 14 years.
- (b) Upper end of Ulna bone was also fixed. Age of fixation was 15 years.
- (c) Lower end of Radius bone was under fixation. Age of fixation was 16 years.
- (d) Lower end of Ulna bone was not fixed. Age of its fixation is 17 years.
- (e) Pelvis bone was appearing but was not fixed. Age of its appearing is 14 years and age of its fixation is 17 years.”

- 15.** Radiologist Dr. Sarita Singh (PW-10) has opined that the radiological age of the prosecutrix (PW-1) was 14 – 16 years. She has admitted her signature from 'A' to 'A' on her report (Ex.P-17). Cross-examination of Dr. Sarita Singh (PW-10) has been done only

on the point that she has stated the age of the prosecutrix (PW-1) on imagination and without examining the x-ray plate. Dr. Sarita Singh (PW-10) has not been cross-examined on the point of her report in which she has stated about fixation of various bones after taking out x-ray of the prosecutrix (PW-1). Thus, her said report has not been challenged in cross-examination nor has been denied on the basis of any medico-legal book.

16. The Appellant in his examination under Section 313 Cr.P.C. has only replied “नहीं मालूम” to the questions put to him regarding the age of the prosecutrix (PW-1) given in her mark-sheet, her age stated in the Court by her parents and her age stated on the basis of the medical report. The Appellant has not led any evidence in rebuttal of the evidence regarding the age of the prosecutrix (PW-1) adduced by the prosecution.
17. Therefore, on the basis of the radiological report (Ex.P-17), the age of the prosecutrix (PW-1) was 14–16 years. According to the mark-sheet of the prosecutrix (PW-1), which was seized vide Ex.P-5, in which her date of birth is recorded as 18.9.1996, her age on 24.2.2013, i.e., on the date of incident, was 16 years and 4 months. According to both the evidence, the age of the prosecutrix (PW-1) does not appear to be more than 18 years.
18. Learned Counsel appearing for the Appellant has placed reliance on **M.C. Prasannan v. State, 1999 Cri.L.J. 998**. In paragraphs 18 and 19 of this judgment, it is observed that the range of error in the determination of age on the basis of the x-ray report may be upto +/- 3 years.

“18. Modi in his 'Medical Jurisprudence' at page 31 stated as follows:-

“..... In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken and an opinion should be given according to the following table, but it must be remembered that too much reliance would not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of the development. Recent work has shown that the range of error may be up to (+/-) 3 years.”

19. The table showing the age in years of the appearance and fusion of some of the epiphysis shows that fusions of some of the joints occur in between the age of 16½ to 18, 17 to 19 and 14 to 17 years. The age given in this table is also not accurate as per the author himself who opined that the range of error in the table may be up to (+/-) 3 years.”

19. Even on applying the principle laid down in **Prasannan case** (supra) to the instant case, the age of the prosecutrix (PW-1), in any circumstance, does not exceed to 18 years. The incident in the instant case occurred on 24.2.2013. With effect from 3.2.2013, an amendment has come into force in sixth description of Section 375 IPC in which the age of 16 years has been substituted by 18 years. Therefore, in view of the material available on record regarding the age of the prosecutrix (PW-1), the contention raised on behalf of the Appellant that the age of the prosecutrix (PW-1) on the date of incident was above 18 years and accordingly offence under Section 376 IPC is not made out against the Appellant is not acceptable. Resultantly, it is established that the age of the

prosecutrix (PW-1) on the date of incident was below 18 years and according to the sixth description of Section 375 IPC, despite the prosecutrix (PW-1) was a consenting party to the sexual intercourse, offence under Section 376 IPC is made out against the Appellant. Likewise, since the age of the prosecutrix (PW-1) is established to be below 18 years on the date of incident, offence under Section 4 of the Act, 2012 is made out against the Appellant.

- 20.** Consequently, the criminal appeal is dismissed. The impugned judgment is affirmed. The conviction imposed upon the Appellant/accused under Sections 363, 366 and 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 is upheld. Keeping in view the facts and circumstances of the case, the sentence awarded to the Appellant/accused by the impugned judgment is also upheld. It is reported that the Appellant/accused is in jail. He shall serve the remaining part of sentence awarded to him by the Trial Court.

Sd/-
(Anil Kumar Shukla)
JUDGE